NO. 82-1565

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,
Appellants,

v.

GEORGE FREITAS,
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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The Appellee Director of Taxation, State of Hawaii, moves the Court to dismiss the herein appeal, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Hawaii on the ground that the questions presented by the Appellants are so unsubstantial as not to need further argument.

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A. The Statute.

This appeal raises the question of the validity of that provision of the Hawaii Liquor Tax Law which exempts okolehao and certain fruit wines manufactured in the State from imposition of the liquor tax (Section 244-4, Hawaii Revised Statutes).

The Hawaii Liquor Tax Law, Chapter 244, Hawaii Revised Statutes, imposes an excise tax[1] upon the sale or use of liquor in the State. The tax is imposed upon the first sale of the liquor in the State and is imposed only once upon the same liquor. The tax is assessed in an amount equal to twenty per cent of the wholesale price. By Section 244-4, the Hawaii State Legislature has exempted from the tax certain expressly enumerated transactions among which are the sale and use of okolehao manufactured in the State and fruit wine manufactured in the State from products grown in the State. In the case of okolehao, the exemption was allowed for the period from May 17, 1971 to June 30, 1981 and for fruit wine the period of the exemption extended from May 17, 1976 to June 30, 1981. Okolehao and fruit wine are not the only alcoholic beverages manufactured in Hawaii. Fruit liqueurs and sake, a Japanese rice wine, are also manufactured in the State the sale of which, however, are not exempted from the tax.

B. The Proceedings Below.

The Appellants[2] are wholesalers of liquor who were made to pay the taxes imposed by the Hawaii Liquor Tax Law. During the period the exemptions were still in effect, the Appellants paid the taxes under protest and filed their complaint for the recovery thereof.

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[1] The Appellants characterize the tax as an *ad valorem* tax although the tax is clearly characterized as an excise tax. In its Opinion, the Hawaii Supreme Court has characterized the tax as an excise tax. The validity of the tax is to be determined by its practical effect and not by the formal language of the statute. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, at 279.

[2] The Appellants in the appeal to the United States Supreme Court are Bacchus Imports, Ltd. and Eagle Distributors, Inc. The appeals of two other wholesalers, Foremost-McKesson, Inc. and Paradise Beverages were consolidated for disposition in the courts of the State of Hawaii but have not joined in this appeal.

Appellants challenge the validity of the assessments upon constitutional grounds by asserting that, because the exemptions are allowed only to okolehao and fruit wine manufactured in the State from products grown in the State, the statute contravenes the Equal Protection (14th Amendment, Section 1), Commerce (Article I, Section 8, Clause 3) and Import-Export (Article I, Section 10, Clause 2) Clauses of the United States Constitution and the Equal Protection (Article I, Section 5) Clause of the Constitution of the State of Hawaii. The Tax Appeal Court of the State of Hawaii, by decision entered January 29, 1980, upheld the validity of the statute and denied the Appellants the relief sought. Upon appeal to the Supreme Court of the State of Hawaii, the decision of the lower court was affirmed by its Opinion entered on December 23, 1982, 65 Haw. ___, (1982). The Court held: "Though we have carefully scrutinized the statute with the cited constitutional provisions in mind, we discern no infirmities in HRS 244-4."

II. ARGUMENT.

The Case Presents No Substantial Question Not Previously Decided By This Court.

1. The Hawaii Liquor Tax Law Does Not Deny Equal Protection of the Laws.

A state tax statute which incorporates a scheme of classification by exempting some, but not others, from the tax is neither arbitrary nor violative of the Equal Protection Clause where a rational relationship exists between the classification and the achievement of a valid legislative purpose. *Vance v. Bradley*, 440 U.S. 93 (1979) at 97. Whether or not the challenged classification is rationally related to the achievement of a legitimate state purpose is to be answered by the two questions:

"(1) Does the challenged legislation have a legitimate state purpose?

"(2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?"

Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981) at 668.

Lawmakers are under no obligation to convince the courts of the correctness of their legislative judgment. It is only necessary that they rationally could have believed that the classification would promote their objectives. *Western & Southern Life Insurance Company v. Board of Equalization, supra; Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). In the field of taxation, the lawmakers possess the greatest latitude in promulgating classifications. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Madden v. Kentucky*, 309 U.S. 83 (1940). The Fourteenth Amendment was not intended to compel the states to adopt an ironclad rule of equal taxation. *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232 (1890). The encouragement of local industries by exempting them from taxation, though not others, is neither arbitrary nor violative of the Equal Protection Clause. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959). Where the legislature has granted an exemption, the presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is hostile and oppressively discriminates against particular persons and classes. The burden then is upon the one attacking the classification to negate every conceivable basis which might support it. *Madden v. Kentucky, supra.*

In the case at bar the exemption was accorded to manufacturers of okolehao for the purpose of encouraging and promoting the establishment of a new industry. Act 26,

Session Laws of Hawaii 1960, Senate Standing Committee Report No. 87, Senate Journal Special Session 1960 at 224. The exemption accorded to manufacturers of fruit wine from products grown in the State is for the purpose of stimulating the local fruit wine industry. Act 39, Session Laws of Hawaii, 1976, Senate Standing Committee Report No. 408-76, Senate Journal 1976 at 1056. The legislative expressions establish that the lawmakers rationally believed that the exemptions would promote their declared objectives. The presumption of its constitutionality, therefore, must be overcome only by the most explicit demonstration of its oppressive hostility and the absence of any conceivable basis to support the exemption. The Appellants have failed to meet their burden in this regard. They have not introduced any evidence, nor have they made any attempt, to controvert this legislative belief. In their Statement of Jurisdiction, the Appellants concede there is no dispute as to the State law or its interpretation, accordingly, the Appellants accept the rationality and purpose underlying the granting of these exemptions. After reviewing the Appellants allegations, the Hawaii Supreme Court has determined that the "statute does not establish a classificatory scheme that disfavors any of the taxpayers . . . all wholesalers of liquor distributing alcoholic beverages in Hawaii are subject to taxation thereunder in similar fashion."

In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the Court held it inherent in the exercise of its power to tax that a state is free to select the subjects of taxation and to grant exemptions and that inequalities which result from singling out of one particular class from taxation or exemption infringes no constitutional limitation. See, also, *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947).

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) is

not apposite hereto. The Ohio statute imposed an *ad valorem* property tax upon accounts receivables of foreign corporations doing business in the State. The receivables were not used in the conduct of business in the State but were used by the foreign corporations in their general business. Accounts receivables of a similar nature owned by residents and domestic corporations were exempt from the tax. The tax was determined to deny equal protection of the laws because the tax was premised purely upon the residency status of the taxpayers. The reciprocity feature of the Ohio statute was determined insufficient to save the statute from the constitutional infirmity.

2. **The Statute Does Not Impose An Impermissible Burden Upon Interstate Commerce.**

Whether or not a State tax impermissibly impinges upon interstate commerce is to be evaluated under the four-part test enounced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), at 279:

> "These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

The Hawaii Liquor Tax comports with these requirements. The tax is imposed upon the wholesaling of liquor in the State and the revenues derived therefrom are used wholly for the support of general governmental services. The tax is assessed only upon the intrastate sales and uses of liquor and does not seek to obtain a share of any revenue derived from the Appellants' business activities outside the State. The tax, accordingly, has no extraterritorial effect.

The Appellants do not dispute they maintain substantial nexus with this State to justify imposition of the tax. Neither do they dispute the tax is fairly related to the services provided by the State. The Hawaii Supreme Court has determined it could perceive no basis to seriously consider the assertion the tax is not fairly apportioned inasmuch as the Appellants agree the tax is assessed only upon the intrastate sales and uses of liquor. Moreover, in light of the fact the tax has no extraterritorial effect and does not seek to obtain a share of revenues derived by the Appellants from their interstate enterprises, there is no possibility that the Appellants will be subjected to a duplicity of taxation from their interstate business activities. The Hawaii court further determined that all of the Appellants, whether incorporated domestically or in a foreign state, may engage in the business of selling liquor in the State upon an equal footing as a result whereof corporations domesticated in the State of Hawaii would gain no advantage over a corporation domesticated in a jurisdiction other than the State of Hawaii.

Where the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed upon interstate commerce is clearly excessive in relation to the benefits derived from the State. *Minnesota v. Clover Leaf Creamery Co., supra.* The burden, if any, is minor inasmuch as it has no effect upon the sale and shipment of the exempted okolehao and fruit wine in interstate commerce. The Appellants have not proven any facts to demonstrate the burden is clearly excessive. The statute, accordingly, is unlike statutes which discriminate oppressively against interstate commerce and which, as a result, have been repeatedly struck down.

Maryland v. Louisiana, 451 U.S. 725 (1981) cited by the Appellants is clearly distinguishable and not apposite

hereto. The State of Louisiana attempted to tax pipeline companies upon their first use of natural gas produced from the Outer Continental Shelf. The gas was piped to processing plants in Louisiana and thereafter sold to out-of-state customers. The tax was to be passed on to the ultimate consumers who were predominantly consumers located outside the state and the only ones to pay the tax because, by way of credits and exclusions, Louisiana customers escaped the tax. The tax was voided because it imposed an impermissible burden upon interstate commerce.

3. **The Statute Does Not Contravene the Import-Export Clause.**

It is not every state exaction upon foreign imports or exports that constitutes a prohibited impost or duty. The test to be applied as to whether or not a state tax constitutes a prohibited impost or duty is set forth in *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976) at pages 285-86:

> "The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."

The Hawaii Liquor Tax is imposed upon all liquor wholesalers engaged in business in the State. It applies to the sale and use of all liquor in the State whether or not the liquor is manufactured and imported from a foreign country, in any of the other forty-nine states or manufactured and sold in this State.

There is no scintilla of evidence that the tax restrains the ability of the Federal Government to conduct foreign policy or that by enactment of the tax, the Hawaii State Legislature has erected a special tariff. The Appellants, therefore, have not demonstrated the tax impedes the ability of the Federal Government to conduct foreign policy or that it impedes the regulation of foreign trade by the United States. *Department of Revenues of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) at 754. The tax is imposed upon wholly intrastate activities and the revenues are used to provide general governmental services, accordingly, the measure does not divert any Federal revenues to the State. Because of its wholly intrastate nature and that the Appellants are doing business in this State, there exist a reasonable nexus with this State. The tax is fairly apportioned because it is assessed only upon the intrastate sales and use of liquor and does not compete with any revenue derived from the Appellants interstate enterprise. The tax, therefore, is non-discriminatory in its practical effect and thereby meets the third requirement. Where the tax is levied only upon activities conducted wholly within the State, the tax is properly apportioned and multiple burdens legally cannot occur. *Department of Revenues of Washington v. Association of Washington Stevedoring Companies, supra.*

The tax, therefore, does not offend any of the three policy considerations prescribed in *Michelin, supra,* and

must be deemed a permitted tax and not a prohibited impost.

The Import-Export Clause prohibits a levy that "'intercepts the import, *as an import*, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State.'" (Emphasis theirs). *Michelin Tire Corp. v. Wages, supra*, at 297 quoting from *Brown v. Maryland*, 12 Wheat, 419, 443. Taxes imposed after an initial sale (*Waring v. The Mayor*, 8 Wall. 110 (1869)); after breaking of shipping packages (*May v. New Orleans*, 178 U.S. 496 (1900)); taxation of goods committed to current operational needs by a manufacturer (*Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959)) have been determined to be permissible levies. Cited in *Michelin v. Wages, supra*, at 287-88.

Department of Revenue v. James Beam Distilling Co., 377 U.S. 341 (1964) does not assist the Appellants. There, a Kentucky statute would have imposed a tax of ten cents per gallon on the importation of whisky into the State. The tax was deemed violative of the Import-Export Clause. However, the decision followed *Low v. Austin*, 13 Wall. 29, which was expressly overruled in *Michelin Tire Co., supra*. The case, therefore, is of no help in questions involving the Import-Export Clause.

III. CONCLUSION.

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Hawaii.

Respectfully submitted,

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